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No. 03-366

IN THE

Supreme Court of the United States

NEW ORLEANS STEVEDORES AND
SIGNAL MUTUAL ADMINISTRATION LTD.,

Petitioners,

v.

PEGGY IBOS, Surviving Spouse of Bertrand Ibos, Jr.,
and DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* LONGSHORE CLAIMS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Longshore Claims Association ("LCA") hereby moves to file a brief as *amicus curiae.* The motion is requested because Respondent Peggy Ibos refuses to grant written consent to file an *amicus* brief. Written consent was obtained from Petitioners New Orleans Stevedores and Signal Mutual Administration Ltd. and will be filed with the Clerk of the Court and accompanies this Brief. Written consent has not yet been obtained from the Director, OWCP, though permission has been requested.

The LCA is uniquely positioned to provide a national perspective on the need for certainty regarding the central issue in this case: the meaning and scope of the "last responsible employer" rule under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* There are compelling legal, policy and economic reasons discussed by the LCA in the accompanying brief for resolving the current conflict that exists among the Circuits on this issue. The longshore employers and insurance carriers represented by the LCA have a strong interest in the resolution of the conflict regarding whether the Act authorizes the imposition of liability for benefits on an employer that proves it had no role in causing an employee's occupational disease.

Unless the Fifth Circuit is reversed on the question now before the Court, a longshore employer will be routinely exposed to compensation liability for workers' occupational injuries despite the fact that such workers' employment did not cause or contribute to the injury. Therefore, the Fifth Circuit's decision, if left intact, will have a significant economic impact on the longshore industry. Moreover, the

decision below creates substantial uncertainty in the longshore industry. The LCA believes the decision below impinges upon the ability of longshore employers to practice consistent employment practices when it comes to hiring employees who may have been previously exposed to asbestos or other harmful substances.

For these reasons, and those discussed in the attached brief, the LCA respectfully request leave to file a brief *amicus curiae*.

Respectfully submitted,

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October 8, 2003

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INTEREST OF THE AMICUS CURIAE[1]

The Longshore Claims Association ("LCA") is a nonprofit, national association made up of longshore employers, insurance carriers, claims professionals, risk managers and attorneys dedicated to the proper administration of various federal workers' compensation acts including the Longshore and Harbor Workers' Compensation Act ("The Act"), the Jones Act and general maritime laws. Established in 1989, the LCA's goals are: to promote claims administration expertise through educational programs; to promote cooperation with the respective authorities under all applicable acts; and to facilitate the fair handling of claims.

Towards those ends, the LCA offers seminars, workshops and local roundtables covering a wide range of issues that affect the admiralty and maritime community. With a growing membership, the LCA continues to expand the opportunities for its members to consult other professionals and sharpen their expertise. As a longshore claims defense advocacy group, the LCA monitors relevant issues pending before the courts and regulatory agencies and disseminates information regarding changes to maritime and admiralty acts.

Members of the LCA are involved in the day-to-day administration of employee injury claims covered by the Act. They have a strong interest in the outcome of the issues in this case, especially as the outcome affects the rights and liabilities of an employer in last responsible employer cases.

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[1] No counsel for a party in this case authored this brief in whole or in part, and the only person or entity, other than the *amicus* and its counsel, which made a monetary contribution to this brief's preparation and submission is Signal Mutual. Signal contributed the copying and printing costs of this brief.

We respectfully submit that the collective expertise of the LCA's members provides a valuable perspective on the questions presented here for review.

SUMMARY OF ARGUMENT

The decision authored by the Fifth Circuit is a reckless departure from proper application of the "last responsible employer" rule under the Act. According to the decision below, an employer can be held liable for compensation benefits for a worker's occupational disease despite the lack of any causal link between exposure at the employer's workplace and the disease itself. This holding is contrary to the plain language of the Act, and conflicts with other circuits, which require an element of causation before imposing compensation benefits on an employer in multiple employer/occupational disease claims. This conflict throws confusion and chaos into what is designed to be a uniform workers' compensation system. Guessing how one occupational disease case should be handled will vary from circuit to circuit. Moreover, by imposing a virtual strict liability system into longshore claims, the costs of insuring for this risk will only increase.

This Court should address the uncertainty flowing from the decision below and a comprehensive rule concerning the application of the last responsible employer rule should be levied. In order to accomplish this task, the LCA respectfully urges the Court to grant the Petition for Writ of Certiorari offered by Petitioners.

ARGUMENT

I. The Fifth Circuit's Decision Below Puts an Onerous Burden upon Longshore Employers.

In *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 636, 103 S. Ct. 2045, 2052 (1983), this Court emphasized that the Act is not a simple remedial statute intended for the benefit of workers. Rather, the Act was designed to strike a balance between the concerns of longshore and harbor workers on the one hand, and their employers on the other. *Id.*; *see Director, OWCP v. Detroit Harbor Terminals*, 850 F.2d 283, 291 (6th Cir. 1988) ("[with the 1972 Amendments], . . . Congress also made it clear that the rights of employers and insurance carriers would not be ignored"). Like other worker compensation statutes, the Act was an innovation by which employers obtained statutory immunity to tort liability in exchange for liability without fault. *See, e.g., Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 23 (1st Cir. 1997). From the LCA's collective industry perspective, the Fifth Circuit's decision all but obliterates any concern for the employers and goes further than the "liability without fault" concept.

The Fifth Circuit's decision creates liability without causation -- a standard that was never meant to be part of the Act's scheme. This result goes directly against this Court's repeated emphasis that Congress did not intend for the Act to produce incongruous results. *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 412 - 413, 52 S. Ct. 187, 188 (1932); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 283, 101 S. Ct. 509, 517 (1980) (*PEPCO*). In *PEPCO*, the Court emphasized that compelling language in the Act could not be ignored or rewritten because it led to seemingly unjust results and added that sympathy is

an insufficient basis for approving a recovery that Congress has not authorized. *PEPCO*, 449 U.S. at 283. Those same admonitions should apply herein.[2]

Though other circuits have had some difficulty with the last responsible employer issue through the years since *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955) was decided, the results have not been as incongruous as the Fifth Circuit's. Up until now, the longshore industry has been able to rely on at least one common theme resonating from earlier decisions. Namely, that there at least be some direct causative element involved in finding an employer liable for a worker's occupational disease. *See, e.g., Cooper/T. Smith Stevedoring Co. v. Liuzza*, 293 F.3d 741, 749 (5th Cir. 2002) ("A *prima facie* case is made by establishing that the conditions existed during the employment that could have caused the harm. An employer may rebut this presumption by demonstrating that the exposure did not cause the harm") (emphasis added); *Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 1320 (9th Cir. 1990) (*Picinich*) ("minimal exposure to offensive stimuli at a place of employment is not sufficient to place responsibility on a covered employer in the absence of proof that exposure in such quantities had the potential to cause his disease") (emphasis added); *Norfolk Shipbuilding & Dry Dock Corp. v. Faulk*, 228 F.3d 378, 385 (4th Cir. 2000) (noting that an employer must prove that exposure at the employer's workplace was not injurious).

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[2] In the instant matter, the Fifth Circuit predicated its ultimate holding on administrative convenience. Arguably, the only thing convenient about the lower court's holding is the ease with which a claimant will be able to make an occupational disease claim.

For reasons that are entirely unclear, the Fifth Circuit departed from this common thread and decided instead that the Act would be better served with a strict liability standard for occupational disease claims involving multiple employers. The LCA recognizes that even though the Act arguably is "'[t]he outstanding statutory application of the *principle* of strict liability'", there remains an important distinction. *Glover v. Aerojet-General Shipyard, Inc.*, 6 BRBS 559 (1977) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, §§ 80 & 81 (4th ed.)). That distinction is the rebuttable presumption. *Id.* By stating that exposure at a particular worksite no longer matters, an employer can be liable for an employee's occupational disease no matter the level of exposure. *But see Picinich*, 914 F.2d 1317, 1322 (9th Cir. 1990) (holding that OSHA standards concerning exposure to asbestos can be considered in determining if the extent of a claimant's asbestos exposure at employer's worksite was potentially harmful). Such a holding takes what was once a reasonable standard and puts an almost insurmountable burden upon employers such as New Orleans Stevedores. Now, instead of having to produce evidence rebutting the presumption that a worker's condition is related to a worker's particular employment, an employer is faced with having to present evidence disproving that a worker's disease was caused by any exposure with any employer.

The LCA's members are gravely concerned that the Fifth Circuit has established a virtually irrebuttable presumption of liability for the last maritime employer.

Those LCA members defending longshore claims will be unable to reconcile the Fifth Circuit's reasoning that "whether an employer can prove that a particular exposure with a particular employer did not have the potential to cause the disease" does not matter with the Ninth Circuit's exact

opposite reasoning. *Compare New Orleans Stevedores v. Ibos*, 317 F.3d 480 (5th Cir. 2003) *with Picinich*, 914 F.2d 1317, 1320 (9th Cir. 1990) ("'All that must be proved is that the covered employer exposed the worker to injurious stimuli *in sufficient quantities to cause the disease.*'") (quoting *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1286 (9th Cir. 1983)). The LCA submits that this conflict is ripe for the Court's review and guidance.

II. The Director's Position Adopted by the Fifth Circuit was Entitled to No Deference.

Not only is there a split of authority among the circuits on how to properly interpret the last responsible employer rule, but to add to the confusion, the agency in charge of regulating this field cannot offer any consistent explanation on the rule's application.

The Fifth Circuit deferred to the Director's interpretation of Section 2(2) of the Act in ruling out a causation element for determining the responsible employer. (App. 7, Petition for Writ of Certiorari of New Orleans Stevedores).

It is likely that the Director will oppose the Petition for Writ of Certiorari and urge the Court to give deference to any opinions it may advance. When the Director offers an interpretation of the Act in a litigation brief, the Court has stated such opinions are owed *Skidmore* deference, meaning that the deference the Court owes to any given interpretation by the Director "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164,

2172 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Unfortunately, much like the Fifth Circuit's departure from previous case law, the Director's opinion in this matter is inconsistent with previous ruminations on the subject and only exacerbates the LCA's concern for consistent application of the Act.

The Director has posited differing opinions on the proper application of the last responsible employer rule. As the agency in charge of administering the Act, the various employers and carriers that make up the LCA have faith that such administration would be done consistently. However, it appears the only way for this to be accomplished is a definitive ruling from this Court.

Illustrative cases in which the Director has advanced differing opinions are as follows:

- ***Stevedoring Services of America v. Director, OWCP*, 297 F.3d 797 (9th Cir. 2002) (*Benjamin*)**

In *Benjamin*, the Director argued that "a second employer could be absolved of liability in an occupational disease case . . . where: (1) the case involved an occupational disease with a delayed onset and progressive disability, e.g., asbestosis, which, (2) was not, in fact, aggravated by further industrial exposure." *Brief of Respondent, Director, OWCP*, 2001 WL 34090132 *22 (July 30, 2001). This position is directly contrary to that advanced by the Director before the Fifth Circuit.

- ***Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co*, 339 F.3d 1102 (9th Cir. 2003) (*Price*)**

The Director offered the following in *Price*: "liability is properly fixed on the last employer who could have causally contributed to the full extent of the worker's disability." *Brief of Respondent, Director, OWCP*, 2002 WL 32154076 *19 (May 16, 2002). Again, the Director argued differently before the Fifth Circuit.

- ***Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179 (4th Cir. 2001)**

In this last example, the Director implicitly recognizes that the last employer rule necessarily involves an element of causation:

> A rule requiring an employer to pay full compensation benefits under the Act where conditions at its worksite contributed to a worker's disability and death, even if other employers also contributed to the disease, is eminently rational because it ensures a worker a remedy from at least one employer who has injuriously exposed him to the toxic material that caused his disease.

Brief of Respondent, Director, OWCP, 2000 WL 33992466 *9 (May 10, 2000) (emphasis added).

The simple correlation to this statement is that a rule requiring an employer to pay full compensation benefits under the Act where conditions at its worksite *did not* contribute to a worker's disability and death is eminently irrational. Allowing the Fifth Circuit's ruling below to stand will only perpetuate such irrationality.

III. The Decision Below is Contrary to the Plain Language of the Act.

The Fifth Circuit has removed the last vestige of actual cause from a causation determination under the Longshore Act thereby ignoring and undermining the actual language of the Act.

Section 2(2) of the Act defines a compensable "injury" to be an "accidental injury arising out of and in the course of employment, and such occupational disease or infection as arising naturally out of such employment or as naturally and unavoidably results from such accidental injury." 33 U.S.C. § 902(2).

The Court and the various federal circuit courts have spoken with clarity concerning how the Act is to be construed. The Courts are unanimous in stating that where the statute speaks with clarity on an issue, the actual language of the statute is applied in all but the most extraordinary circumstances. *Estate of Cowart v. Nicklos Drilling Company,* 505 U.S. 469, 112 S. Ct. 2589 (1992) (Court enforced the clear meaning of the words contained in Section 33(g) of the Act); *Alexander v. Director, OWCP,* 297 F.3d 805 (9th Cir. 2002)(plain language of the Act does not extend the credit for benefits paid under other laws to alternative settlement awards); *Todd Pacific Shipyards v. Director, OWCP,* 139 F.3d 1309 (9th Cir. 1998))(credit doctrine does not apply to situations not devised in the Longshore Act), *Ortco Contractors, Inc.v. Charpentier,* 332 F.3d 383 (5th Cir. 2003) (Benefits Review Board cannot create a higher evidentiary standard to be met by a defending employer beyond the "substantial evidence" standard expressly stated in the Longshore Act); *AZ International v. Phillips,* 323 F.3d 1141 (9th Cir. 2003)(The Act does not provide a specific mechanism

to deal with claimants who made a false statement and there was no justification within the Act for the employer's request that damages be assessed against a fraudulent claimant).

The Act itself provides that a compensable injury arise out of and in the course of employment and therefore be causally related to such employment. This traditional and long established element of admiralty practice and procedure was disregarded by the Fifth Circuit when it concluded that the test for rebuttal of the last employer presumption is not medical causation, but, rather, whether the exposure to asbestos by any of a claimant's historic employers did not cause or have the potential to cause the mesothelioma. (App. 8-9, Petition for Writ Certiorari of New Orleans Stevedores).

The Fifth Circuit determination in *Ibos* rejects both the "rationale connection" test of the Ninth Circuit in *Cordero* and the determination in *Cordero* opinion and later Ninth Circuit opinions that liability falls upon the employer at the time of the most recent injury that bears a causal relationship to the disability. The determination in *Ibos* is the first decision by United States Court of Appeals to impose liability upon an employer even if the employer proves that it has in no way caused, contributed to or aggravated the employee's occupational disease. In so doing, the decision in *Ibos* establishes a standard which adversely affects the uniformity of the application of the Act and presents a direct conflict between the Fifth Circuit and the Ninth Circuit law.

Further, the outcome in *Ibos* adversely affects the traditional Longshore Act maritime worker's compensation standard which has, until now, required that there be a causal link between the disability and the employment circumstance to establish liability. The determination in *Ibos* expands the

potential risks of waterfront employers beyond which has previously been understood to be an insurable risk.

With respect to asbestos disease in particular, the decision in *Ibos* has a potentially adverse impact on employment practices. Asbestos is a prohibited substance and has been significantly abated at all work places. Historically, asbestos has been used in vessel construction and maritime employers take care to hire contractors to remove asbestos to the point where exposure to asbestos at shipyards is so low as to be trivial. Under the determination by the Fifth Circuit, an employer would be ill advised to hire anyone with a prior exposure to asbestos because of the high risk of liability even in the event of a trivial exposure.

The LCA asks the Court to consider that the effect of the Fifth Circuit opinion is to penalize those waterfront employers who maintain a clean work environment for those employers will be treated like all others and found to be liable for all compensation and medical care and treatment benefits should it be their unhappy lot to be the last employer before the institution of a Longshore Act claim. Such a result is inconsistent with the actual language of the Act and the historical interpretation of the Act by other federal circuit courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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